Filed June 12 1905
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Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1904.

No. 171.

A. Y. CHRISMAN and H. T. CHRISMAN,
Plaintiffs in Error,

v.

E. O. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

Brief of Defendants on Motion to Dismiss or Affirm.

L. L. Coey,
Attorney and Counsel for Defendants in Error.

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107-122 N. Byrne, Los Angeles.
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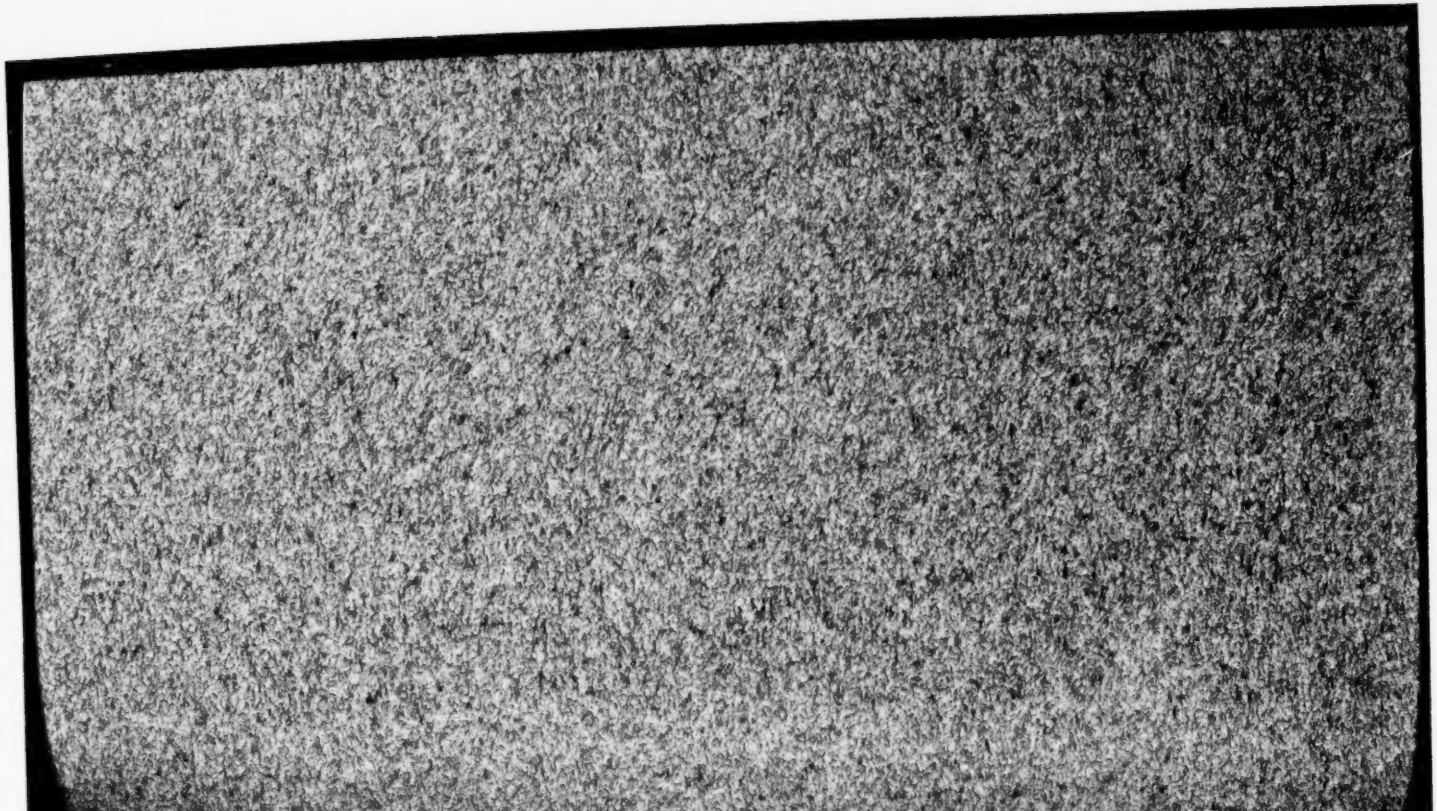

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Brief of Defendants on Motion to Dismiss or Affirm.

Come now E. O. Miller and The Home Oil Company, a corporation, and move this court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because no Federal question was set up or claimed in this cause before the Supreme Court of the State of California, and, also, because the decision of the Supreme Court of the State of Cal-

ifornia was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

And the said defendants in error also move the court to affirm the said judgment or decree, from which said writ of error purports to have been taken, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet, it is manifest that said writ of error was taken for delay only, is frivolous, and does not need further argument.

L. L. Cory,

Attorney and Counsel for Defendants in Error.

STATEMENT OF FACTS.

The facts in this case, in so far as it is necessary for them to be considered on this motion, are as follows:

The contest arose because of conflicting claims to 160 acres of placer mining ground, in the County of Fresno, State of California. The plaintiffs, the intervenor, and the defendants each claimed title to the property under respective placer mining locations. The intervenor, not having joined in the application for a writ of error, need not further be considered. On the 31st day of December, 1896, E. O. Miller, one of the defendants in error, and his seven associates filed a notice of location on the premises in controversy, claiming the same as a placer mining location. He, thereupon, marked the boundaries of his claim so that they could be readily traced, and thereafter, and on January 5th, 1897, recorded a copy of the notice of location in the County Recorder's Office of said County of Fresno. On September 17th, 1897, E. O. Miller, who had acquired all the interests of his co-locators in the property, leased the premises to one Frank Barrett, who immediately, and on the same day, assigned the lease to The Home Oil Company, the other defendant in error. Under that lease, the Home Oil Company went into possession of the premises and prosecuted the development of the claim diligently, discovering valuable deposits of petroleum and oil at a depth of about 700 feet in the first well drilled by it. The further development of the territory by it determined that the particular land in controversy is of very great value.

The claims of the plaintiffs in error depend upon the validity of two placer mining locations made by them respectively, on January 1st, 1897, each covering 20 acres of the land previously located by E. O. Miller and his associates. The

notices of location of these two claims were posted upon the ground and the boundaries of the claims were marked so they could be readily traced, but no discovery of oil or other mineral was ever made by either of the plaintiffs in error within the boundaries of their respective claims, the finding of the lower court being that the only discovery of oil within the limits of the 160 acres covered by the location of E. O. Miller and his associates was that made by The Home Oil Company, as stated.

On October 14th, 1898, the defendants in error commenced an action against the plaintiffs in error in the Superior Court of the County of Fresno, State of California, for the purpose of quieting their title against the alleged claims of the plaintiffs in error. The defendants answered and the case came on regularly for trial by the court without a jury, and, after a somewhat lengthy and protracted trial, a judgment was rendered in favor of the plaintiffs in that case, affirming the validity of the location under which they claimed title to the premises, and finding, as the ultimate facts, that E. O. Miller and his co-locators, citizens of the United States, located the land as a placer mining claim upon vacant land of the United States; that their notice of location was properly posted; that the boundaries of the claim were marked so that they could be readily traced; that The Home Oil Company, ever since its lease, has been, and was, at the time of the commencement of the action, in the *actual, exclusive* and *peaceable possession* of the entire 160 acres, and that the only discovery of oil made thereon was that made by The Home Oil Company in the well which it so drilled; that the defendants had not any right, title or claim in and to any portion of the property, *that neither of them had ever made any discovery of mineral, petroleum or oil,* within the boundaries of either of

their claims, and adjudged the claims of the defendants to be invalid and groundless.

From this judgment an appeal was taken to the Supreme Court of the State of California, the result of which appeal being that the judgment of the lower court was affirmed, the opinion being a part of the record in this case. The decision was rendered *in banc*, all of the Justices concurring, with the exception of the Chief Justice, who, thereafter, and upon application of the plaintiffs in error, granted the writ of error now under consideration. Twenty-two errors are assigned in support of the writ of error so obtained. Errors 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18 and 20, all relate to findings of fact based upon sufficient evidence which facts were found adverse to the contention of the plaintiffs in error, and which are not open to review by this court. The other assignments of error do not pretend to be based upon any Federal question and relate to matters as to which no issue was presented by the pleadings.

ARGUMENT.

MOTION TO DISMISS.

1. No Federal Question was set up or claimed in the court below.

The first ground on which is based our motion to dismiss the writ of error for lack of jurisdiction is that no Federal question was set up or claimed in the court below. The pleadings printed in the transcript of the record fail to show any reference to the Constitution of the United States or any of the laws of the United States, either directly or indirectly, and the record of the trial and appellate proceedings also fail to show any such claim set up or made, at any time, or at any place.

There are certain Federal questions which need not be raised in the lower court, but this is not one of them. This particular Federal question is one of the third class enumerated in Section 709 of the Revised Statutes.

In the case of Columbia W. P. Co. v. Columbia E. S. R. L. & P. Co., 172 U. S., 475, this court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, Section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

1. " 'Where is drawn in question the validity of a statute of, or an authority exercised under, the *United States*, and the decision is *against their* validity;'

2. "'Where is drawn in question the validity of a statute of, or an authority exercised under, any *State* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision *is in favor of* their validity;'

3. "'Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity *specially set up and claimed* by either party under such Constitution, statute, commission, or authority.' There is no doubt that under the third class the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. Spies v. Illinois, 123 U. S., 131, 181, (31:80, 91); French v. Hopkins, 124 U. S., 524 (31:536); Chappell v. Bradshaw, 128 U. S., 132 (32:369); Baldwin v. Kansas, 129 U. S., 52 (32:640); Leeper v. Texas, 139 U. S., 462 (35:225); Oxley Stave Co. v. Butler County, 166 U. S., 648 (41:1149)."

It is true that no particular form of words or phrases is necessary to comply with the requirement that the Federal right be specially set up or claimed.

Green B. & M. Co. v. Patten Paper Co., 172 U. S., 58.
Dewey v. Des Moines, 173 U. S., 193.

But averments to present such a question must be so distinct and positive as to place it beyond question that the party bringing the case from the State court intended to assert a Federal right.

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

In the case of F. G. Oxley Stave Co. v. Butler County, 166 U. S., 648, this court went fully into the question of the

necessity for the claim to have been "specially set up and claimed" before the lower court. It was there said:

"But can it be said that the plaintiffs '*specially* set up or claimed' the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution, or even adopting its phraseology—that the decree was passed against deceased persons, as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in Section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court shall not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or Statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.
* * *

"Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a

case here from such a court intended to assert a Federal right."

And this conclusion has been repeatedly reaffirmed and we call attention to the following cases where the rule has been laid down and which is applicable to this case:

"But when the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was 'specially set up or claimed' under such Constitution or laws. Rev. St., 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right."

Kipley v. Illinois, 170 U. S., 182.

"If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare."

Chapin v. Fye, 179 U. S., 127.

In which case the party clearly raised a Federal question, but inadvertently named the Fifth and Seventh Amendments to the Constitution instead of the Fourteenth Amendment, but this was held insufficient and the writ of error was dismissed.

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the third division of section 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond any

question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission or authority, of the United States. Applying this rule to the case before us, the writ of error cannot be maintained."

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

"To give us jurisdiction under section 709, of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here, the decision must be against the right *so set up or claimed.*"

Jacobi v. Alabama, 187 U. S., 133.

The Federal question relied upon to confer this jurisdiction cannot first be raised in the Supreme Court of the United States.

Quimby v. Boyd, 128 U. S., 488.

Sweringen v. St. Louis, 185 U. S., 38.

Neither is it raised in time when it first appears in the petition for writ of error from the Supreme Court of the United States to the State Court.

Johnson v. N. Y. Life Ins. Co., 187 U. S., 491.

Telleride P. T. Co. v. Rio Grande W. Ry. Co., 187 U. S., 569.

It is not in time when first presented on an application for a rehearing in the highest court of the state.

Capital Nat. Bank v. First Nat. Bank, 172 U. S., 425.
Easter B. & L. Assn. v. Welling, 181 U. S., 47.
Weber v. Rogan, 188 U. S., 10.

In the case of Mutual Life Ins. Co. v. McGrew, 188 U. S., 291, Chief Justice Fuller, speaking for the court says:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Sec. 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that, in order to maintain it, the right, title, privilege, or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Jacobi v. Alabama 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. Loeb. v. Columbia Twp. 179 U. S. 472, 481, 45 L. ed. 280, 286, 21 Sup. Ct. Rep. 174. It is not properly made when made for the first time in a petition for rehearing after judgment; or in a petition for a writ of error; or in the briefs of counsel not made part of the record. Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Zadig v. Baldwin, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639. The assertion of the right

must be made unmistakably, and not left to mere inference. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. * * * Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47." * * *

"We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the supreme court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. Stoddard v. Treadwell, 29 Cal. 281; King v. Meyer, 35 Cal. 646; Deady v. Townsend, 57 Cal. 298; Williams v. McDonald, 58 Cal. 527; Anderson v. Black, 70 Cal. 226, 231, 11 Pac. 700."

In this connection it is settled law that a judgment or decree of a state court cannot be re-examined in this court simply because a Federal question was presented to the state court for a determination. That court must also decide it.

Detroit City Ry. Co. v. Guthard, 114 U. S. 133.

Israel v. Arthur, 152 U. S. 355.

Whether the Federal claim was properly and sufficiently set up is a question for this court and any statement by the court below or by any of its members does not bind this court.

As was said in the late case of *Erie Railroad Co. v. Purdy*, 185 U. S., 148:

"We state the matter in this way because, as said in Carter v. Texas, 177 U. S. 442, 447, 'the question whether a right

or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. Neal v. Delaware, 103 U. S., 370, 396, 397; Mitchell v. Clark, 110 U. S., 633, 645; Boyd v. Thayer, 143 U. S. 135, 180.'"

And it has been held that a certificate by the Chief Justice of the Supreme Court of the State is insufficient to give this court jurisdiction, but that such a certificate may be used to make certain and specific what is too general and indefinite in the record.

See Yazoo & Miss. Railroad Co. v. Adams, 180 U. S. 41, and cases cited.

It was held in Zadig v. Baldwin, 166 U. S., 485, that statements from the briefs filed in the Supreme Court of the State were not proper to show that the Federal question was raised in the lower court, and this has never been overruled.

But in New York Central Railroad Co. v. New York, 186 U. S., 269, it was said:—

"But assuming, without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

And the court looked at the briefs to see if the Federal question was raised in them, and found it was not.

It is to the record alone, as sent up to this court, that resort can be had for the purpose of ascertaining whether the judg-

ment of the state court sought to be reviewed is within its appellate jurisdiction.

Inglee v. Coolidge, 2 Wheat, 363.

Goodenough H. Mfg. Co. v. Rhode Island H. Co., 153 U. S. 635.

Spies v. Illinois, 123 U. S., 131.

In determining whether the record shows any case for the exercise, by the Supreme court of the United States, of its appellate jurisdiction over state courts, that court is not at liberty to resort to forced inferences and conjectural reasoning, or possible, if not probable, suppositions of the points raised in and decided by the state courts.

Ocean Ins. Co. v. Polleys, 13 Pet. 157.

But it must appear on the face of the record that a Federal question did arise in the state court, and that it was decided.

Gray v. Coan, 154 U. S. 589.

Clark v. Penn. 128 U. S. 395.

In the case of Hooker v. Los Angeles, 188 U. S. 314, it is said:

"The truth is there is nothing in this record adequately showing that the state courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

"In Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777, after stating the contention of the plaintiff in error that the effect of the judgment of the state court was 'to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution, of being protected

from such deprivation or denial,' we said: 'But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below. * * * * We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that the plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error.'"

In the case of Home for Incurables v. City of New York, 187 U. S. 155, speaking to the question as to what the record must necessarily show in order to vest jurisdiction in this court, Justice Harlan said:—

"The plaintiff insists here that the state court by its final judgment, refused to recognize certain rights belonging to it under the Constitution of the United States. But it does not appear on the face of the record that it set up or claimed any such right until it reached this court. In Parmelee v. Lawrence, 11 Wall. 36, 38, 20 L. ed. 48, 49, this court—following the previous cases of Lawler v. Walker, 14 How. 152, 14 L. ed. 365, and Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381—said it was essential to our jurisdiction, in reexamining the judgment of the state court, that the alleged conflict between the state law and the Constitution of the United

States 'appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court,' or 'it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it.' Later cases in this court, have expressed the additional thought that, if the highest court of the state assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient in itself to sustain the judgment, independently of any question of Federal right.

"In the case before us the Home for Incurables has not brought upon the record the fact that it asserted in the state court any Federal right whatever. It is entirely consistent with the record that the Home did not, at any time pending the case in the state court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege or immunity shall have been specially set up or claimed in the state court. Rev. Stat. 709 (U. S. Comp. Stat. 1901, p. 575); Armstrong v. The Treasurer, 16 Pet. 281, 285, 10 L. ed. 965, 966; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 180, 18 L. ed. 381, 382; Powell v. Brunswick County, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Roby v. Colehour, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709;

Levy v. San Francisco City & County Super. Ct., 167 U. S. 175-177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769.

"It is true that the transcript contains the certificate of the chief judge of the court of appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the Home did make, in that court, the Federal questions now pressed upon our consideration. But that certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine Federal questions that do not appear, in any form, from the record, to have been brought to the attention of the state court. Powell v. Brunswick County, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Newport Light Co. v. Newport, 151 U. S. 527, 537, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 47, 45 L. ed. 415, 418, 21 Sup. Ct. Rep. 256; Felix v. Scharnweber 125 U. S. 54, 59, 31 L. ed. 687, 688, 8 Sup. Ct. Rep. 759.

"Having no jurisdiction to examine the judgment below, *the writ of error must be dismissed.*"

The record in this particular case, in accordance with the practice and statutes of the State of California, is composed of the pleadings of the respective parties (pp. 1-21); the findings and judgment of the lower court (pp. 21-33); the notice to move for a new trial, (p. 36), the statement on motion for a new trial prepared by the plaintiffs in error and settled by the court (pp. 38-117); which purports to give all of the proceedings had and testimony taken upon which the

appellants would rely on their appeal to the Supreme Court of the State, together with the particular assignments of error upon which the appellants also rely (pp. 112-116), the notice of appeal and the copy of the opinion of the Supreme Court of the State of California, *in bank* (pp 121-127).

A most minute examination of this record will fail to disclose any attempt on the part of the plaintiffs in error to set up or claim, specially, or otherwise, any title, right, privilege or immunity granted by the Constitution or laws of the United States. In fact, the record is most barren of any such attempt.

The disputed questions in this case arose upon the validity of the different locations asserted respectively by the plaintiffs in error and the defendants in error, the solution of which questions depended upon the determination of disputed and controverted questions of fact, all of which, without exception, were resolved in favor of these defendants in error, all of which fully appears from a reading of the opinion of the Supreme Court.

The only pretext that the plaintiffs in error have for now asserting that any Federal question was ever set up or claimed by them, or either of them, must be based upon a statement in that opinion that it was the contention of the *intervenor*, that the Miller location was invalid and that the effect of the conveyance of his co-locators to Miller, before discovery, operated as an abandonment by them of their locations, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed the subsequent discovery of oil did not, and could not serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to relocate 20 acres upon his discovery (p. 126).

The Supreme Court then proceeds to discuss that propo-

sition. It will be noted that, from the express language of the opinion, it was the intervenor only, who presented this contention to the Supreme Court. How, or in what manner, or where that contention was made by the intervenor the record does not disclose. Nothing is affirmatively, or otherwise, disclosed in the record from which this court can determine how or in what manner that question was set up or claimed, even if it be conceded to be a Federal question. It is a sufficient answer to any argument presented upon that theory by the plaintiffs in error that neither of them ever set up or claimed that any Federal question was ever presented.

In the nature of things, it is impossible for us further to specify or particularize any attempt on the part of these plaintiffs in error to specifically, or otherwise, set up or claim a Federal question. The answer of the defendants denies, in terms, the allegations of the complaint, which placed in issue the validity of the location under which the defendants in error dereigned their title. As a special defense these plaintiffs in error set up the mineral locations attempted to be made on portions of this property by them, and, as a further defense, alleged that the Miller location was made in pursuance of a certain conspiracy between E. O. Miller and his co-laborers and conspirators, and that the other co-locators were so-called "dummy" locators (pp. 8-16).

Certainly there is no pretense of an attempt to set up or claim a Federal question in the answer. An examination of the proceedings had at the trial also discloses no attempt on the part of these plaintiffs in error to set up or claim any Federal question: not an objection was made, nor an exception taken, or a motion for a non suit based upon any pretended theory that any Federal right, title, privilege or immunity was at issue, or that these plaintiffs in error were deprived of the

benefit thereof. The assignments of error upon which the petition for the writ of error was based, do not specify, in terms the invasion of Federal right of the plaintiffs in error.

If by any possibility we can be in error as to any of these statements, counsel for plaintiffs in error will hasten to correct it, and will then point out to this Court how, or in what manner any Federal question was set up or claimed, and we await with interest such a designation from counsel.

In the case of Beals v. Cone, 188 U. S., 184, it appeared that the action was one known in mining regions as an adverse suit brought under the authority of certain sections of the Revised Statutes, and the question presented was as to the priority of right thereto of the respective parties by virtue of discovery and location, which is the precise question which arose and controlled the final determination of the case at bar. A writ of error was obtained from the state court and a motion was made to dismiss or affirm.

Justice Brewer, in delivering the opinion of the court, said:

"The mere fact that this is an action brought under Secs. 2325 and 2326, Rev. Stat. (U. S. Comp. Stat., 1901, pp. 1429, 1430), in support of an adverse claim, does not, of itself, entitle the defeated party to a writ of error. Although brought under the authority of a Federal Statute, the questions involved may be only of general or local law. Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726. * * * *

"The record of the trial which took place before the jury, is voluminous,—the bill of exceptions, containing the testimony, the instructions, and the proceedings on the motion for a new trial, filling 436 printed pages. The testimony was mainly directed to such matters of fact as the time and place of dis-

covery of mineral, the character of the veins, the per cent. of mineral, and the general nature of the rock formations in which the veins were alleged to have been discovered. From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the Constitution or statutes of the United States. No statute of the State of Colorado was questioned, nor was any right, title, privilege, or immunity under the Constitution or laws of the United States specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States, and none of any particular statute. In the motion for a new trial, as well as in the assignments of error in the supreme court of the state, there is not the slightest reference to the Constitution, the laws of the United States, or any section or part thereof. And in the opinion of the Supreme Court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege, or immunity under the Constitution or laws of the United States. Indeed, while the case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters and to those alone, was the attention of the parties and the courts directed. * * * One cannot, however, fail to be impressed, after a perusal thereof with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a state; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any right, title,

privilege or immunity of a Federal nature was specially set up or claimed. Very likely the construction and the effect of Federal statutes were, in a general way, discussed and considered, but nowhere do we find a special setting up or claiming of a Federal right which justifies us in taking jurisdiction."

In the case of California Oil and Gas Co. v. Miller, 96 Fed. 12, which was a case involving the title and right to the possession of the Southwest quarter of Section twenty, in township nineteen south of range fifteen, east, M. D. B. & M., (the land in controversy in this case being the Northeast quarter of said section twenty), Wellborn, J., said:

"Two things are necessary to the existence of a Federal question: First, an actual dispute between the parties as to the meaning of some law of the United States; second, materiality of the construction of such law to a determination of the cause. These two constituents have been succinctly stated thus:

" 'A cause is not removable simply because in its progress it may become necessary to construe or apply an act of Congress. Unless there is a dispute between the parties as to the meaning of the act, there is no Federal controversy between them. The decision of the case, or some material issue in it, must depend upon the construction of the act claimed by one party and denied by the other. A simple averment that such is the fact is stating a conclusion, and is not sufficient; the facts that show it to be true must be set out.' Fitzgerald v. Railway Co., 45 Fed. 812; State v. Chicago, M. & St. P. Ry. Co., 33 Fed. 394.

"See, also Water Co. v. Keyes, 96 U. S. 199; Giggs v. Crandall, 120 U. S. 106, 7 Sup. Ct. 497; Metcalf v. Watertown, 128 U. S. 589, 9 Sup. Ct. 173; City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. Rep. 905.

"All except the last of the citations in this paragraph are cases of removal, but the requirements, so far as concerns the Federal question which authorizes a removal, are the same as those which confer original jurisdiction. Section 1 of each of three acts of congress below and in this paragraph named gives to the circuit courts of the United States 'original cognizance * * * of all suits of a civil nature * * * arising under the constitution or laws of the United States.' Section 2 of the act of congress of March 3, 1875, in one of its clauses (18 U. S. Stat. 470) provides for the removal of any suit 'arising under the constitution or laws of the United States.' The clause above referred to, as amended by the act of March 3, 1887 (24 U. S. Stat. 552), and corrected by the act of August 13, 1888 (25 U. S. Stat. 433), authorizes the removal of any suit 'of which the circuit courts of the United States are given original jurisdiction' by section 1 of said last named act, which section confers original jurisdiction upon the circuit courts 'of all suits * * * arising under the constitution or laws of the United States.' 25 U. S. Stat. 434. Where there is no dispute between the parties as to the meaning of any Federal law, but the case involves issues of fact solely,—as, for instance, which of two mining locations was first made, or whether or not the boundaries of either were marked upon the ground, or whether or not assessment work had been performed,—the case is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through such constitution, law or treaty. Bushnell v. Smelting Co. 148 U. S. 682, 13 Sup. Ct. 771; Budzisz v. Steel Co., 170 U. S. 41, 18 Sup. Ct. 503; Theurkauf v. Ireland, 27 Fed. 769; Holland v. Hyde, 41 Fed. 897; Mining Co. v. Kinney, 46 Fed. 832; Mining Co. v. Woody, 50 Fed. 633; Argonaut

Min. Co. v. Kennedy Mining & Milling Co., 84 Fed. 1; King v. Lawson, Id. 209; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 29 C. C. A. 462, 85 Fed. 867; St. Paul M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 15 C. C. A. 167, 68 Fed. 2; Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148; Crystal Springs Land & Water Co. v. City of Los Angeles, 82 Fed. 114. In this last case the first paragraph of the syllabus is as follows:

"'When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court.'

"While some of the cases cited in the preceding paragraph were on writs of error to state courts, yet, in determining when there is a federal question, such cases are equally instructive with those originally brought in circuit courts. Railway v. Taylor, 86 Fed. 168."

In the leading case of Bushnell v. Crooke M. & S. Co., 148 U. S. 682, it appeared that the controversy in that case was with reference to certain locations upon mineral ground of the United States, and that after the final decision of the State court had been rendered, the record shows, that a petition for a rehearing was presented, for the first time attempting to raise a Federal question.

A motion to dismiss or affirm was made, and in speaking to this question the Court said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the decision of the supreme court affirming the action of the trial court as to instructions given, as

well as its refusal to give instructions asked by the defendants below fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the supreme court of the state, nor does it appear from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States.

"The decision of the supreme court of Colorado in no way brought into question the validity or even construction of any Federal statute and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the Chief Justice, in Cook County v. Calumet & Canal & D. Co., 138 U. S. 635, 653 (34: 1110, 1116): 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'

"The attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a Federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state. Texas & P. R. Co. v. Southern Pac. R. Co., 137 U. S. 48, 54, (34: 614, 617); Butler v. Gage, 138 U. S. 52 (34:869); Winona & St. P. R. Co. v. Plainview 143 U. S. 371 (36:191); Leeper v. Texas, 139 U. S. 462 (35:225)."

In support of both of the contentions, which we now make, attacking the jurisdiction of this court, to-wit:

(a) That the record fails to show that any Federal question was specially set or claimed, and decided adversely to plaintiff in error;

(b) That the decision of the State court rests upon an independent ground broad enough to sustain it without deciding any alleged Federal question;

we submit the following language of Justice Day in the case of Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655:

"When the jurisdiction depends, as in the present cases, upon a right, privilege or immunity under the Constitution of the United States specially set up and denied in the state court, certain propositions, it is said by Mr. Chief Justice Fuller, speaking for the court in Sayward v. Denny, 185 U. S. 180-183, 39 L. ed. 941, 942, Sup. Ct. Rep. 777, are well settled; among others, 'The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed. Hoyt v. Shelden, 1 Black, 518, 17 L. ed. 65; Maxwell v. Newhold, 18 How. 511, 515, 15 L. ed. 506, 508. * * * Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly invoked so that the state court could not have given judgment without deciding it.' It is equally well settled that if the decision of a state court rests on an independent ground —one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court. New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Eustis v. Bolles,

150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Dower v. Richards, 151 U. S. 658-666, 38 L. ed. 305-308, 14 Sup. Ct. Rep. 452; Wade v. Lawder, 165 U. S. 624-628, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

"In every case which comes to this court on writ of error or appeal the question of jurisdiction must first be answered, whether propounded by counsel or not. Defiance Waterworks v. Defiance, 191 U. S. 184, 24 Sup. Ct. Rep. 63."

Upon this branch of the case we respectfully submit that the record presented for the consideration of this court upon this writ of error fails to disclose that a Federal question was set up or claimed by the plaintiffs in error at any state of the proceedings in the trial court or the appellate court, and, as the record does not affirmatively disclose the jurisdiction of this court, under the uniform rule established by the decisions of this court, we respectfully ask that the writ of error be dismissed.

2. The court below decided the case upon an independent, non-Federal, ground, broad enough to support the judgment.

As has been stated, this is an action to quiet title to the Northeast quarter of Section 20, Township 19 South, Range 15 East, M. D. B. & M., all the parties claiming title and right to possession by virtue of locations made under the mineral laws of the United States (p. 121).

The trial court, among other things, found that E. O. Miller was the owner of the property (p. 21), and that the Home Oil Company was the lessee of the property claiming title under the plaintiff, E. O. Miller, and "*at the commencement of this action was, ever since has been, and is now in the actual possession of the same and of every part thereof*"; that the

plaintiffs in error claim an estate or interest, adverse to the plaintiffs, in and to a part of the land, but that their alleged claims are without right (p. 22). That on December 31, 1896, the property described was a part of the public domain of the United States, open to location for mining purposes under the laws of the United States (p. 22). That on the 31st day of December, 1896, E. O. Miller and his co-locators, eight in all, each of them being a citizen of the United States, located said 160 acres under the laws of the United States, and did mark their claim on the land so that the boundaries thereof could be readily traced (p. 23). That on the 31st day of July, 1897, all of the co-locators of E. O. Miller granted and conveyed to the plaintiff, E. O. Miller, all their right, title and interest in and to said quarter section; and on the 17th day of September, 1897, the latter made a lease unto one, Frank Barrett of the property in controversy, and that the lessee went into possession of the property by virtue of the terms of said lease, and on the same day, for a valuable consideration, assigned his lease to The Home Oil Company, and that The Home Oil Company thereupon, went into the immediate possession of all of said property under and by virtue of said lease, "*and ever since has been, and now is, in the exclusive possession of all of the same and every part thereof*" (p. 23). That thereafter, the lessee commenced the development of said property and expended more than $30,000 for that purpose, and as a result discovered large quantities of petroleum therein, and that at the commencement of said action, there existed wells of great depth upon said premises, sunk and excavated by The Home Oil Company from which there is a daily flow of large quantities of petroleum of great value (p. 24). That ever since September 17th, 1897, the defendant in error, the Home

Oil Company, *"has been and now is in the sole and exclusive possession of all of said property and engaged in working, developing and mining the same and extracting petroleum and other fluid products therefrom."* That on the 1st day of January, 1897, the defendant, A. Y. Chrisman, a citizen of the United States, entered upon a portion of said premises and posted a notice of location, that he claimed 20 acres thereof for mining purposes, and that the boundaries thereof were marked so as to be readily traced (p. 24). That on the same day, H. T. Chrisman, a citizen of the United States, did enter upon the possession of a part of said premises and did post a notice of location that he claimed 20 acres thereof for mining purposes, and that the boundaries of said 20 acres were marked so that they could be readily traced (p. 25).

The court further finds, upon abundant evidence, the following facts:

"That said defendant, A. Y. Chrisman, never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid product upon said lands, or upon any part thereof, is the discovery made by the plaintiff, Home Oil Company as in these findings before stated" (p. 25).

In addition to the foregoing the court finds: That when said locations of the plaintiffs in error were made, that no part of said quarter section was vacant, but on the contrary, the whole of the same was then in the possession of E. O. Miller and his co-locators; that the plaintiffs in error did not make their locations in good faith, and that they never did or performed any work or labor thereon as required by the laws of the United States or the State of California (p. 25).

The court found numerous other findings of fact relating to other issues presented by their pleadings, but which are not material to the points now under discussion.

The Supreme Court in its opinion (pp. 121-27), after deciding that the Barieau location was invalid for the reason that no discovery of mineral was made thereunder, proceeds:

"Thus having been determined that the initiation of the claim of Miller and his associates was founded in the right, there remains to be considered the objection urged against the validity of that location. And first it is insisted that the location is invalid because Miller, prior to his location, but upon the same day, executed an abandonment to the Government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made in good faith, but was designed as a fraud upon the United States to evade the performance of the assessment work required by law. But the answer to this is that the court, upon sufficient evidence, finds against this contention, and, furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon. As to the other objections made to the validity of the Miller location, it is sufficient to say, without discussing the evidence, that the court was justified in its finding that the requirements of the posting of a sufficient notice and demarkation of boundaries were all complied with in accordance with law. So, too, the evidence warrants the finding of the court that the persons named as co-locators in the Miller location were *bona fide* locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion and conspiracy upon the part of these locators.

"It is disclosed by the evidence that Miller, his associates and lessees remained in possession of the land, and with diligence and great expense prosecuted the work of boring wells. This work finally resulted in success, oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus, not only made a discovery, but are the ones of all of the alleged locators who have done so. It has been said that it is not necessary that discovery should precede nor coexist with the posting of notice and the marking of the claim, but that a discovery subsequently made perfects the title except so far as the rights of others may have intervened. This proposition is perhaps too well recognized to require citation of authorities, but reference may be made to 1 Lindley on Mines, sec. 330; Jupiter M. Co. v. Bodie C. M. Co. 11 Fed. Rep. 666; North Noonday M. Co. v. Orient M. Co. 1 Fed. Rep. 522; Thompson v. Spray, 72 Cal. 528; Erwin v. Perigo, 93 Fed. Rep. 608; Erhardt v. Boaro, 113 U. S. 527; English v. Johnson, 17 Cal. 108. * * * * It appears that Miller, his co-locators and other successors in interest, remained in the actual and undisturbed possession of the entire property from the date of their location until the commencement of this action."

It thus appears from the findings of the trial court and the decision of the Supreme Court, sought to be reviewed in this proceeding, that on the 31st day of December 1896 the land in controversy was open to location; that on that day a notice of location was posted by E. O. Miller and his seven associates as an association, and that the boundaries of their claim were marked so that they could be readily traced; that thereafter, and before any intervening rights accrued, a discovery of oil was made under that location, and since December 31st, 1896, the defendant in error, E. O. Miller, and The

Home Oil Company, as his lessee, have been in the sole, exclusive, personal and peaceable occupation and possession of all of said premises, developing the same, and have expended large sums of money thereon, and have discovered large quantities of petroleum therein, and the land has become exceedingly valuable. That plaintiffs in error intruded upon the possession of the defendants in error for the purpose of making their alleged locations, but they had never performed any work thereunder for assessment purposes, or otherwise, and that neither one of them has ever made any discovery of mineral within the boundaries of their alleged claims.

The alleged locations of plaintiffs in error were made shortly after midnight (pp. 78, 80).

Under such a state of facts our contention is that the decision of the Supreme Court of the State of California upon those questions is determinative of the rights of the parties and is broad enough to support its decision without reference to other grounds.

It has been uniformly held that questions of fact, when once settled in the courts of a state, are not subject to review in this court.

W. U. T. Co. v. Call Pub. Co., 181 U. S. 92.
Gardner v. Bonestill, 180 U. S. 362.

In the late case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, the following language is used:

"It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41

L. ed. 472, 17 Sup. Ct. Rep. 110; Hedrick v. Atchison T. & S. F. R. Co., 167 U. S. 673-677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 L. ed. 392-394, 18 Sup. Ct. Rep. 38; Egan v. Hart, 165 U. S., 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court."

If the decision of a Federal question in a state court is rendered unnecessary by the view which that court properly takes of the rest of the case within the scope of its pleadings, the judgment is not open to review in the Supreme Court of the United States.

Chapman v. Goodnow, 123 U. S. 540.

Wells v. Goodnow, 150 U. S. 84.

Where the state court disposes of the case upon non-Federal grounds sufficient to support its judgment, it is obvious that the Supreme Court of the United States cannot review such judgment on the theory that a decision of a Federal question was necessarily involved.

McManus v. O'Sullivan, 91 U. S. 578.

Crossley v. New Orleans, 108 U. S. 105.

N. Y. C. & A. R. R. Co. v. N. Y. 186 U. S. 269.

The foregoing rule is true even though the Supreme Court of the United States may think the position of the state court an unsound one.

Klinger v. Missouri, 13 Wall. 257.

De Saussure v. Gaillard, 27 U. S. 216.

In inquiring whether jurisdiction to review a decree of a state court may be declined because such decree may be sustainable on an independent non-Federal ground the Supreme Court of the United States considers only the final action of the highest court of a state in disposing of the controversy, and is not concerned with the conclusions of the trial court or of the department of such highest court.

Allen v. S. P. R. Co. 173 U. S. 479.

The principle which we are now affirming is clearly stated in Bacon v. Texas, 163 U. S. 207, as follows:

"But where there are two grounds for the judgment of the state court, only one of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the Federal question, inasmuch as there is another ground upon which the judgment can rest, and it will dismiss the writ for that reason. Eustis v. Bolles, 150 U. S., 361. In the course of the opinion in that case, which was delivered by Mr. Justice Shiras, the case of Beaupre v. Noyes, 138 U. S. 397, 401, is cited and the opinion of the latter case contains the following statement: 'Whether the state court so interpreted the territorial statute as to deny such writ to plaintiffs in error, we need not inquire, for it proceeds in part with another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the judgment, without reference to that question.' The opinion after stating what that ground was, thus continues: 'That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment, without reference to the Federal question.'

"In Rutland Railroad v. Central Vermont Railroad, 159 U. S. 630, it is stated, 'that where a state court, in rendering

a judgment decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error without considering the Federal question.' To same effect are Gillis v. Stinchfield, 159 U. S. 658, 660; and Seneca Nation of Indians v. Christy, 162 U. S. 283."

In the case of Harrison v. Morton, 171 U. S., 38, it is said:

"The supreme court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question and decided adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in Eustis v. Bolles, 150 U. S., 361. It is sufficient to announce the rule pronounced in that case:

" 'It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook County v. Calumet & Chicago Canal Co. 138 U. S. 635.

" 'It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the

Federal question, to sustain the judgment, this court will not review the judgment.' See also Wade v. Lawder, 165 U. S. 624."

In the case of McQuade v. Trenton, 172 U. S., 636, it is said:

"We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question, not Federal, were also raised and decided against the plaintiff in error, and the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment."

In Seeberger v. McCormick, 175 U. S. 274, this Court said:

"It has been frequently held that the contention, even if formally made, that the plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States does not give us jurisdiction to review the judgment of the Supreme Court of a State where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. Beaupre v. Noyes, 138 U. S., 397; Eustis v. Bolles, 150 U. S. 361, Pierce v. Somerset Railway, 171 U. S., 641; Remington Paper Co. v. Watson, 173 U. S., 443."

The trial court found the following facts in this case:

1. *That neither of the plaintiffs in error ever made any discovery of mineral within the boundaries of their respective claims.* (p. 25.)

2. *That when they attempted to make their locations, the land was in the actual occupancy and possession of the defendants in error.* (p. 25).

3. *That the defendants in error were likewise in the actual occupancy and possession of the premises in controversy*

at the time of the commencement of their action against the plaintiffs in error. (p. 22).

These findings were approved by the decision of the supreme court sought to be reviewed herein, and in our opinion are determinative of this case upon this hearing.

As we understand it, these findings of fact must be taken as true upon this hearing, and being true, the plaintiffs in error were mere naked trespassers, and the possessory title of the defendants in error was alone sufficient to support the final judgment in their favor.

In the case of Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732, it was stated:

"Unless some reason is shown not found in this record these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their homes, seize their improvements, and settle exactly where they settled, and by these acts require the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homi-

cides and other crimes of less turpitude." * * * * "It follows that the defendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were *mere naked trespassers*, making an unwarranted intrusion upon the enclosure of another; an enclosure and occupation of years, on which time, and labor and money had been expended; and that in such a wrongful attempt to seize the fruits of other men's labor there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous and the judgment founded on it must be reversed."

This rule is quoted with approval by Judge Ross in the case of the Sierra-Nevada Oil Co. v. Home Oil Company, 98 Fed. 673, as the very question presented in this record, came before Judge Ross for decision. By an examination of the case just referred to, it will be seen that the plaintiff in the action contested the validity of the precise location under which the defendants in error claim and sought to recover this territory under two locations, the latter of which was made by one Jackson on the 26th day of May, 1898.

The record there showed that the defendants were at the time of the Jackson location, as in this, in the actual possession of the claim in controversy and actually engaged in mining it for oil, and Judge Ross held in that case as follows:

"It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which

is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and above board and made in good faith. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 372. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his cabin. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws."

In the case of Cowell v. Lammers, 21 Fed. 200, it appeared that one McCarty, the manager of the plaintiff, was in the actual possession and occupation of certain land having it under fence and in actual use; that the defendant, by permission of the plaintiff, had erected a cabin on a portion of the lands of the plaintiff other than that part upon which the trespass is alleged to have been committed. That thereafter, the defendant, without the consent and against the will of plaintiff, entered upon the portion involved in the action, assuming it to be public mineral land, and located a mining claim thereon. It will be seen that there was no force or fraud of any kind exercised, but that the mining location was made against the will and without the consent of the plaintiff.

In discussing the question the Court says:

"The complainant insists that, in view of the indisputable

facts appearing in the case, the defendant is not in a position which entitles him, in this proceeding to collaterally assail the validity of his title under the patent for two reasons; and, if I rightly comprehend the decisions of the Supreme Court upon similar questions, he is clearly right in this position. In Atherton v. Fowler the Supreme Court distinctly held that no right of pre-emption can be established by a settlement and improvement on a tract of land conceded to the public, where the pre-emption claimant intruded upon the actual possession of another, who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract, that such an intrusion is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. (96 U. S. 513). This decision was affirmed in Hosmer v. Wallace, 97 U. S. 759, and Quinby v. Conlan, 104 U. S. 421. In the latter case the court says: 'A settlement cannot be made upon land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emption right. Such is the purport of our decisions in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 97 U. S. 575; 104 U. S. 423. The laws no more authorize a trespass upon the actual possession and occupation of another, for the purpose of initiating a pre-emption right to take up and acquire under the statutes the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land. The law does not encourage or permit, for any purpose, unlawful intrusions and trespasses upon the actual possession and occupation of another. To permit a right or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such a character as to greatly disturb the public tranquility. We are, fortunately, not without painful examples of this

kind in this state. Actual possession and occupation of lands in good faith, public or otherwise, have always, as against naked trespassers, been regarded as evidence of title, and fully protected by the courts of this state from its first settlement. In this case the defendant intruded upon the actual possession and occupation of the complainant, prospected for and located a supposed mine upon lands which had been inclosed with a substantial fence and in the actual possession, occupation, and use of the complainant and his immediate grantor for eight years, claiming title under a patent of the United States, regularly issued fourteen years before. He is a mere stranger and trespasser upon the actual possession and occupation of the complainant, without any right recognized by the law of the land, and is not in a position to assail the complainant's title. If this is not the rule established by the decisions of the Supreme Court, then I am unable to comprehend their import. See also Doll v. Meador, 16 Cal. 320, et seq."

In the case of Crossman v. Pendery, 8 Fed. 693, it appeared that the case was submitted upon an agreed state of facts to the effect that the ground in controversy was covered by two locations, both regular in form. That the Orion claim was first surveyed, located and staked, and that the locators had steadily prosecuted work in the development thereof, and had discovered mineral in several places. That the other location was made subsequent to the Orion and while the locators of the latter were in possession thereof, and that under the second location mineral was discovered and before the discovery of the locator of the Orion.

Justice Miller, after stating the facts, proceeds:

"The question submitted to the court is this: Can prospect-

ors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the Court that inasmuch as the plaintiffs allowed defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and made location thereof, without protest, the defendants now have a better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceedings prior to the discovery by the defendants, or by either party. A prospector on the public mineral domain may protect himself in the possession of his pedis possession while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the Government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such discoverer a title to the mineral first discovered, against which a mere possession of surface cannot prevail, and in this case judgment must be for the defendants."

In the very late case of Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, Justice Brewer said:

"It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go over the public domain, build cabins and establish themselves temporarily, at least as occupants. * * * Such occupation is often accompanied by buildings and enclosures for housing and care of stock. * * * These occupants are not in the eye of the law con-

sidered as technically trespassers. No individual can interfere with their possession or compel them to leave. Their possessory rights are recognized as of value and may be subjects of barter and sale. * * * In this respect we must notice the oft-repeated declaration of this Court, that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereof.' Ard. v. Brandon, 156 U. S. 537, 543, 39 L. ed. 523, 526, 15 Sup. Ct. Rep. 406; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, *ante* 274, 275, 20 Sup. Ct. Rep. 236."

In the case of Pacific L. & I. Co. v. Elwood Oil Co. 112 Fed. 4, Judge Hawley, of the United States Circuit Court of Appeals, said:

"The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton v. Fowler, 96 U. S. 513, 513, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands; that the right to make improvements is to be exercised on unimproved lands; that the right to erect a dwelling house is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others.

"No right can be initiated on government land which is in the actual possession of another by forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 21 Fed. 200, 202; Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579; Tremouth v. San Francisco, 100 U. S. 251; Mower v. Fletcher, 166 U. S. 380, 385-6; Haws v. Victoria Copper M. Co. 160 U. S. 303, 317; Nickals v. Winn, 17 Nev. 188, 193; McBrown v. Morris, 59

Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588; Rourke v. McNally, 98 Cal. 291.

"The decisions upon this point are not all confined to cases where the entry is forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another, without the use of force.

"In Quinby v. Conlan, 104 U. S. 420, 423, the element of force is not shown to have existed and it is not adverted to in the opinion. The Court said: 'A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decision in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 79 id. 575.'

"In Goodwin v. McCabe, *supra*, the Court said: 'If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not.'

"In Gird v. California Oil Co., 60 Fed. 531, 545, this principle is recognized. The Court said: 'If Irland was in the actual possession, and working the ground for himself, and Barfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event, the location would have been made upon ground not vacant, and open to location, but upon ground in the actual and adverse occupancy of another.'

"Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not, at the time of such selection, 'vacant land open to settlement,' it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

"It necessarily follows, from the views we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The Court did not, therefore, err in sustaining the demurrer and dismissing the bill."

The same rule has been established by various decisions of our state Court. In the case of Davis v. Scott, 56 Cal. 165, the syllabus is as follows:

"The right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others. The Justice, Morrison, in referring to the case of Atherton v. Fowler, *supra*, quotes the decision of Justice Miller with approval, saying, among other things, 'The defendant, having made an ineffectual attempt to pre-empt the land in controversy, invaded the plaintiff's possession, and now withholds the possession from him. It is impossible for us to perceive any just claim or right which the defendant can assert in support of his entry. He did not have a pre-emption claim to the land, or to any portion thereof, and could not, under the highest authority of law, become a pre-emptioner thereof. The land was in the actual possession and occupation of the plaintiff at the time the defendant attempted to locate a pre-emption claim thereon, and it was not, therefore, subject to pre-emption.'"

A later case is that of McBrown v. Morris, 59 Cal. 64. The opinion was written by Thornton, and concurred in by Mc-

Kinstry and Ross, and reaffirms the case of Atherton against Fowler, and other decisions of this state and of the United States. It appeared in that case that at the time of the entry complained of, the plaintiff was in actual possession of the land, and used the same for dairy and other purposes, and that the main question presented was whether the defendant could initiate a right by entering and settling upon the land within the inclosure of and occupancy and possession of another without his consent and against his express prohibition.

In part, Judge Thornton says:

"The right to make a settlement was to be exercised on unsettled land, and to make improvements on unimproved land. * * * It would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire any inchoate rights to the public land by trespass. That the entry of defendant as expressly found was made without the consent of plaintiff, or his tenants, and against their wish, and he was forbidden to make such entry by them. The findings of fact bring this case within the determination of the cases cited. * * * That such an intrusion, though made under pretense of pre-empting the lands is but an unlawful trespass and cannot initiate a right of pre-emption."

In the case of Rourke v. McNally, 98 Cal. 291, the court says:

"Since she entered into the actual possession of another, it is no moment that her entry was peaceable, because made in the presence of plaintiff. * * * Until she has acquired some such right or connected herself in some lawful mode with the true title, she cannot resist the presumption of title in the plaintiff which arises from the fact of his prior pos-

session. The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement, though made by one qualified to purchase from the government to acquire such a homestead, although such entry is made with the intent to acquire the title in some lawful mode. (Atherton v. Fowler, 96 U. S. 513; Dunwood v. Martin, 120 U. S. 369; Quinby v. Conol, 104 U. S. 381; McBrown v. Morris, 59 Cal. 68; Goodwin v. McCabe, 75 Cal. 584; Bullock v. Rouse, 81 Cal. 590; Peterson v. Kinkead, 92 Cal. 372.)"

In the case of McGuire v. Brown, 106 Cal. 660, it is said:

"Our conclusion is supported by analogy also with the rule for many years enforced both in the federal courts and the courts of this state, that the right of property which the laws of Congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. (McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 588, and cases cited.)"

In the case of Phenix M. & M. Co. v. Lawrence, 55 Cal. 143, it is said:

"The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the

entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right." * * *

"But the defendants offer no evidence of right or title. They knew that the mine was in the possession of the plaintiff and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what they supposed to be a defect in the title of plaintiff. * * * It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected, that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the Recorder's office of the district."

In the early case of Attwood v. Fricot, 17 Cal. 43, the Court says:

"We are inclined to think that some of the instructions given at the instance of the defendant, whether correct or not, as abstract propositions applicable to real estate, had a tendency to mislead the jury when applied to the facts of the record. Mining claims are held by possession, but that possession is regulated and defined by usage and local, conventional rules, and the 'actual possession' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be acquired in a mining claim in order to give a right of action for the invasion of it. The claim must

be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of the mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters bona fide under color of a title, as under a deed or lease, the possession of a part against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of the possessor, in such instances, would not be worse than that of the occupant of other real estate, in which case the rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger, with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc.; but the case we suppose is of a possession taken independently of such rules."

Again, in the great case of English v. Johnson, 17 Cal. p. 108, which is more largely cited, perhaps, than any other case in the books, upon this subject, the Court takes occasion to say:

"The Court charged the jury, in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain an action; and further, that this possession need not be further evidenced by actual inclosures, but 'if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries,' this was enough as against any one entering with-

out title. We see no objection to this ruling. In the late cases of Atwood v. Fricot, et al., *ante* 37, we lay down some rules on this general subject. The taking up of mineral land in pursuance of the mining regulations of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of prescribed rules given by statute, gives a possessory title to public or agricultural land. But it does not follow, because this is the regular or usual way of obtaining possession, that a possession not so obtained would necessarily be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last.

"The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims we require no other acts, as evidence of possession, than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. A party may be in possession by himself, or by his agents or servants. Going on the land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting, or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off to run into the claim—would be a possession of the claim within the

meaning of the rule. If, as was held in the case of Attwood v. Fricot, et al., the party entered under written claim or color of title, his possession except as against the true owner or a prior occupant, would be good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. In this case, it seems the plaintiffs took up, in connection with others, these claims sued for, marking and defining, in the way usual among miners, the limits; and also bought out the interest of two of their associates, original appropriators. But we think where a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only upon, or of a part, and though the party does not enter in accordance with mining rules, or under paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion."

Again, in the case of the Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198. (We quote from the syllabus):

"Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, al-

though such acts of appropriation are not done in accordance with any local mining rule."

Applying these principles of law to the facts in this case, as determined by the courts of the State of California, we are of the opinion that our contention upon this branch of the case should be sustained, and that this court should determine, as a matter of law, that the decision of the supreme court of the state of California is based upon grounds, non federal in character, sufficient to support its judgment.

MOTION TO AFFIRM.

Assuming that the record may show that this court has jurisdiction, it is manifest that this writ of error was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as to need no further argument.

The judgment sought to be reviewed discusses the various contentions made by the different parties in interest and decides them, *seriatim*, in favor of these defendants in error. In the course of the decision it is stated:

"Defendants and intervenor make common cause upon most of the matters presented upon appeal.

"Their contentions are:

"1. That the location by Barieau and others upon the 14th of June, 1895, was a valid location which divested the land of its status as part of the public domain, and appropriated it to private claim and domain until the end of the year, 1896.

"2. That, therefore, Miller's attempted location upon December 31st, 1896, was void because made at a time when there was a valid subsisting location upon the land; because it was not based on a discovery and was not perfected by a subsequent discovery until the rights of other parties attached; because the location was in fact made only by Miller, Hall and Hannah, the other five co-locators being mere dummies, and, finally, because the boundaries of the location were not marked upon the ground so that they could be readily traced.

"3. That no assessment work whatsoever having been done upon the land in question during the year 1896, by or on behalf of Barieau and his co-locators, the Barieau location lapsed,

and on the first day of January, 1897, the land again became open for exploration and location, and was so open at the time that defendants made their locations upon January 1, 1897; that their locations were and at all times have been, valid subsisting locations" (pp. 121-122).

The decision then proceeds to discuss these contentions. As to the Barieau location, the court says:—

"It will thus be noted that none of the appellants claim under the Barieau location, nor contend that they have acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896 by failure to perform the statutory amount of labor. If, however, the Barieau location was not a valid location, *as the court finds*, (Italics ours), then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the court, as has been said, were against the validity of the Barieau location.

"Without discussing other grounds of objection made to that location, we are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land" (p. 122).

Upon the second point the court determines that Miller's location on December 31st, 1896, was valid, and was not made at a time when there was any valid, subsisting location upon the land, but, on the contrary, that it was vacant and unoccupied at the time of his location; that it was based upon the actual discovery of oil, and that the claim was located and oil actually discovered before the rights of any of the parties attached, and that the other five co-locators of Miller, et al., were not dummies, and that the boundaries of the claim were dis-

tinctly marked upon the ground. In other words, upon the facts found by the lower court, upon sufficient evidence, the appellate court found each of the contentions set forth in subdivision 2 adverse to the position taken by these plaintiffs in error (p. 124). As to the question presented in subdivision 3 the court found, which finding was approved by the appellate court, that there never was a Barieau location, but that it was invalid from its inception, and that the land was not open for exploration or location on January 1st, 1897, at a time when these plaintiffs in error attempted to make their alleged locations.

The solution of all of the foregoing questions depends upon the determination of questions of fact alone. The facts being found, the principles of law applicable to them are perfectly well settled and ascertained.

There is only one further question discussed in the decision which, by the express language of the decision, *was presented by the intervenor alone.*

The language of the decision is as follows:

"It appears further that upon the 31st day of July, 1897, and before any discovery of oil had been made, Miller's associates and co-locators executed to him a deed of all their right, title and interest in the property. Subsequently, and upon the 17th day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the plaintiff, Home Oil Company. The Home Oil Company thereupon took possession of the premises, bored for, and in the month of October, 1897, struck oil, and made the first discovery upon the land in question. Upon this state of facts intervenor contends that the location was invalid; that the effect of the conveyance of his co-locators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity

of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not and could not serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to re-locate twenty acres about his discovery (p. 126).

"It will be noted that it nowhere appears in the decision, or by the record, that this point was ever presented by the present plaintiffs in error. After thus stating the position, the court determines it in favor of the defendants in error, and against the contention of the intervenor" (pp. 126-127).

As a matter of fact, the only basis for a contention on the part of the plaintiffs in error, in this proceeding is that the court erred in its findings of fact; but the findings are conclusive upon these points and cannot be re-examined for any purpose.

As was said in the case of Egan v. Hart, 165 U. S. 188:

"On error, however, to a State court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. Dower v. Richards, 151 U. S., 658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. Schwalby, 162 U. S., 255, 278. True, it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, 317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in Dower v. Richards and in the subsequent cases referred to."

And this has been repeatedly reaffirmed; see,

Hedrick v. A. T. & S. F. Ry. Co., 167 U. S. 673.
Atchison T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96.
Whitney v. United States, 181 U. S., 104.
Eastern B. & L. Assn. v. Ebaugh, 185 U. S., 114.
Jenkins v. Neff, 185 U. S., 230.
Bement v. National Harrow Co., 185 U. S., 70.

It would seem that there can be no room for argument upon any of these questions. The findings of the state court are conclusive that the Miller location was a valid and subsisting location; that the location was made by Miller and his seven co-locators in good faith; that a valuable discovery of oil was made under that location by the lessee of Miller, The Home Oil Company, before the rights of any other person intervened; that neither of these plaintiffs in error ever made any discovery of oil within the boundaries of their respective claims; that the plaintiffs in error never, at any time, discovered any seepage of petroleum or other mineral, or oil within the boundaries of their respective claims; that their attempted locations were made while Miller and his associates were in the actual possession of the premises in dispute; that at the time Miller's location was made, the land was vacant and unoccupied Government land of the United States. These being the admitted facts upon this hearing, it would seem that the principles of law governing these facts have been so thoroughly well established as to admit of no further argument.

The language in the case of Equitable Life Assurance Society v. Brown, 187 U. S. 308, would seem to be appropriate:

"It is evident on the face of the record that the question on the merits is not open to possible contention, because it has been previously so specifically and adversely ruled on by this

court as to absolutely foreclose further contention on the subject."

As was said in the case of McLaughlin v. Fowler, 154 U. S., 663:

"We can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question."

"Murdock v. City of Memphis, 20 Wall., 590."

By an examination of the assignment of errors (pp. 131-133) we note that no Federal question is presented or raised, by inference, or otherwise, and that the chief attack made by the plaintiffs in error herein is against the findings of fact, affirmed by the appellate court. There is not a substantial Federal question presented in any of the assignments of error (pp. 131-133), and this is, therefore, such a case as this court has held shall be affirmed without further delay or argument.

In the case of Wilson v. North Carolina, 169 U. S., 586, it is said:

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

"In Hamblin v. Western Land Company, 147 U. S., 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts.' Millingar v. Hartupee, 6 Wall. 258; New Or-

leans v. New Orleans Water Works Co., 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.' "

If it can be conceived that any Federal question is set up, or claimed, or relied upon, it is so devoid of any substantial foundation or merit as to bring it within the decision of this court.

The case of New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, where it is said:

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit, there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus, in Millingar v. Hartuppe, 6 Wall., 258, the Chief Justice (at page 261), said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power.' This case arose under the 25th session upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its valid-

ity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion."

And the question of the necessity of a substantial claim was fully reviewed by this court in the late case of Equitable Life Assurance Society v. Brown, 187 U. S. 308. *supra*, in the following language:

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in New Orleans Water Works v. Louisiana, 185 U. S., 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited. It is likewise so apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in Chanute v. Trader, 132 U. S., 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; Richardson v. Louisville & N. R. Co., 169 U. S., 128, 42 L. ed. 687, 18 Sup. Ct. Rep., 268, and Blythe v. Hinckley, 180 U. S., 338, 45 L. ed. 561, 21 Sup. Ct. Rep., 390."

In the case of Wabash R. Co. v. Flannigan, 192 U. S. 28, 40 L. ed. 328, Justice White says:

"As the settled rule in this court is that where the Federal question asserted to be contained is manifestly lacking all color of merit, the writ of error must be dismissed (Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783, and cases cited), it results that the writ of error in this case must be dismissed for want of jurisdiction."

We again refer to the case of Beals v. Cone, 188 U. S., 184, *supra*, where it is said:

"Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters, and those alone, was the attention of the parties and the courts directed. Counsel for plaintiff in error has filed an elaborate brief of 249 printed pages, which is able and exhaustive, both on questions of mining law and the conduct of the trial. One cannot, however, fail to be impressed, after a perusal thereof, with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a state; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any right, title, privilege or immunity of a Federal nature was specially set up and claimed. Very likely the construction and the effect of Federal statutes were, in a general way discussed and considered but nowhere do we find that special setting up or claiming of a Federal right which justifies us in taking jurisdiction. As we have stated, the validity of no Federal statute was denied

in the state courts. Neither did the plaintiff in error, prior to the judgment of affirmance in the Supreme Court, challenge the validity of any state statute on the ground of its repugnance to paramount Federal law. The writ of error is dismissed."

Upon all the authorities here presented, applied to the facts as disclosed by the record, we respectfully ask that the writ of error be dismissed, or, if not dismissed, that the judgment be affirmed. Respectfully submitted,

L. L. CORY,
Attorney and Counsel for Defendants in Error.